

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 September 2008

Public Authority: Ministry of Justice
Address: 54-60 Victoria Street
London
SW1E 6QW

Summary

The complainant requested details of the disciplinary action taken against judges including their names, the reasons for the disciplinary action and dates. The Ministry of Justice (MoJ) refused to disclose this information under section 40 of the Act. The Commissioner has investigated and concluded that section 40 is engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure of the requested information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant has advised that on 11 July 2005 he made the following request to the Department for Constitutional Affairs (now known as the Ministry of Justice, MoJ):

"(a) the number of times since August 1998 that the Lord Chancellor has reprimanded / taken further action against judges and other judicial office holders in response to a complaint about their personal conduct.

(b) the names of the judges or other judicial office holders in each instance since August 1998;

(c) the date on which the Lord Chancellor reprimanded / took further action in each instance since August 1998;

(d) a reasonable and informative description of the reason why the Lord Chancellor reprimanded / took further action in each case since August 1998;

(e) the title of the court case (if applicable) to which the complaint refers in each case since August 1998;

(f) a complete copy of the letter sent by the Lord Chancellor to the judge or other judicial office holder in each case since August 1998 (if applicable);

(g) a complete copy of the letter sent by the Lord Chancellor to the judge or other judicial office holder asking them to a meeting of his officials to discuss the complaint in each case since August 1998 (if applicable)."

3. MoJ responded on 5 December 2005 providing some of the requested information as requested in part (a) of the request, but refusing to provide the remaining information by virtue of section 31 and 36 of the Act. The MOJ also explained that the information requested in part (g) is not held.
4. On 16 June 2006 the complainant requested an internal review of the decision specifically asking MoJ to reconsider the application of the exemptions in relation to the information requested in parts (b) to (f).

The Investigation

Scope of the case

5. On 5 October 2006 the complainant contacted the Commissioner to complain about the way his request has been handled. The complainant asked the Commissioner to investigate the length of time taken to complete an internal review of the refusal of 5 December 2005. The complainant also asked the Commissioner to review the refusal to disclose the requested information in (b) to (f) of his request.
6. On 7 November 2006 the Commissioner contacted MoJ to remind them of the need to complete internal reviews promptly and asked that a review response now be sent to the complainant.
7. On 11 November 2006 MoJ completed its internal review and provided a substantive response to the complainant. The review upheld the original decision to withhold the requested information under section 31 and 36 of the Act.
8. The Commissioners investigation has therefore focused on reviewing the application of sections 31 and 36 to the withheld information in parts (b) to (f) of the complainant's request.

Chronology

9. The Commissioner began his investigation by writing to MoJ on 13 November 2007 to request a copy of the information being withheld and for further explanation regarding the application of the two exemptions including an expansion on the public interest test.
10. MoJ responded on 19 March 2008 providing further explanation regarding the application of the exemptions. MoJ also explained that it now wished to rely on section 40 in addition to section 31 and 36 to withhold the information.
11. MoJ provided the Commissioner with examples of the withheld information on 6 May 2008 to enable him to further consider the application of the exemptions.
12. On 22 May 2008 the Commissioner wrote again to the MoJ to request further clarification regarding the application of the exemptions.
13. MoJ responded on 2 July 2008 providing more information regarding its application of section 40 to the withheld information.

Findings of fact

14. The information which is held and which falls within the scope of the request is, in relation to each instance, a detailed summary of the incident which precipitated the disciplinary action including details of the investigation and a copy of a letter sent to the individual by the Lord Chancellor with the outcome of the investigation.

Analysis

Procedural matters: Section 17 'Refusal of Request'

15. Section 17(1) states that a public authority which is relying on a claim that the information is exempt, must, within the time for complying issue a refusal notice which:
 - (a) states the fact that information is exempt,
 - (b) specifies the exemption in question, and
 - (c) states why the exemption applies.
16. Section 10 of the Act provides that a public authority must comply with section 1 of the Act no later than the twentieth working day following receipt of the request. Section 1 states that a person making a request for information is entitled to be informed in writing if the information is held and if so to have the information communicated to him. Full texts of the relevant sections are included in the 'legal annex' section of this notice.
17. The complainant made his request on 11 July 2005. However the MoJ did not respond to this request until 5 December 2005. This was outside of the 20 working days allowed under section 10.

18. The Commissioner finds that the refusal notice was issued in breach of section 17(1) as it was issued outside the time allowed for compliance under section 10 of the Act.
19. The Commissioner also finds that by failing to explain to the complainant its reliance on section 40(4) the MoJ breached the requirements of section 17(1) (a), (b)(c) and 17(3).

Exemption: Section 40 'Personal Data'

20. Section 40(2) (a) provides an exemption for information which is the personal data of any third party. In order to rely on this exemption the Commissioner must first determine if the withheld information is the personal data of any third party.
21. The Data Protection Act 1998 (DPA) defines personal information as:

'...data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'
22. The information withheld contains details of the individuals subject to disciplinary actions as well as a detailed description of the incident / investigation and the outcome. The information also contains details of third parties involved in either the incident or investigation. The Commissioner is therefore satisfied that all the withheld information constitutes personal data as defined above.
23. The Commissioner notes that MoJ argue that disclosure of the withheld information would be in breach of the first data protection principle as it would be unfair. The first data protection principle has two components:

"1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
(a) at least one of the conditions of schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is met."
24. In considering whether disclosure of the withheld information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
 - The individual's reasonable expectations of what would happen to their information;
 - The seniority of the individuals;

- Whether disclosure would cause any unnecessary or unjustified damage to the individuals; and
 - The legitimate interests of the public in seeing the withheld information.
25. MoJ argue that the investigative process will be at its most effective if those involved understand that it is carried out on a confidential basis except where the Lord Chancellor (LC) and Lord Chief Justice (LCJ) believe there exists a wider public interest which is met by identifying particular judges.
 26. MoJ state that public confidence in the judiciary requires that the public be satisfied of the independence and integrity and competence of the members of the judiciary who are called to sit in judgement on a very wide range of issues including those involving credibility and moral and social questions. The functions of the LC and LCJ must be able to be exercised in the way best calculated to guarantee that independence, integrity and competence are achieved. In some cases, the MoJ explained that a decisive and public response to an egregious lapse from proper standards of judicial conduct may be necessary in order to repair existing damage to public confidence whereas in other cases disciplinary interventions have to be directed towards preventing damage to public confidence arising in the first place. This will sometime be achieved most effectively by forestalling impending criticism with a clear public demonstration of the effectiveness of the intervention but sometimes the effectiveness will require that a lapse is dealt with entirely confidentially for example in a case in which giving publicity to a disciplinary intervention would be counterproductive or disproportionate. A proportionate relationship must be maintained between the misconduct, the response to the misconduct and public perceptions.
 27. The LC and LCJ in determining how to act in any disciplinary case will consider a wider range of factors including the nature, scale and seriousness of the misconduct, its relationship to the judge's discharge of his judicial functions and the extent to which the judge's personal and private life is involved or at risk. The MoJ also stated that the nature of press coverage and public reaction to any disciplinary issues concerning the judiciary demonstrates a consistently disproportionate level of intrusiveness.
 28. MoJ also argued that disclosure could undermine the judge's authority and command when hearing cases and increase the potential for disruption to individual court cases being heard by a judge who had been disciplined.
 29. MoJ also clarified that the request focuses on complaints regarding the personal conduct of judicial officer holders and not to professional misconduct of the judiciary. In most of the cases the personal misconduct was related directly to the individual's personal life and not their professional role and whilst the action in one impacted on the other, disclosure would unfairly intrude on the personal life of the judicial officer holder.
 30. MoJ state that the individual's expectation of privacy in relation to complaints was further reinforced by the fact that recently the Constitutional Reform Act made explicit provision for confidentiality in relation to information provided during the course of a judicial complaint or conduct investigation.

31. The Commissioner considers that the information contains details of the individual's personal lives which have called into question their ability to continue in their judicial roles. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that:

'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'

32. In this case the information relates to both. The Commissioner recognises that where a person's personal life can impact on their suitability to undertake a particular role then it is likely that the individual would be aware that their conduct in their personal life would be open to scrutiny. However, it is unlikely that they would expect this scrutiny to be made public. The Commissioner also notes that the Judicial Complaints Protocol specifies that correspondence between the LC, the judiciary and officials is confidential and that therefore both the complainant, other third parties named and the judiciary would have had an expectation that the personal information provided (both their own and others) to assist an investigation and the personal information gathered about them would be treated in a confidential matter.
33. The Commissioner therefore considers that the individuals would have a reasonable expectation that the information would not be made public and that disclosure would cause them unwarranted distress and damage.
34. The Commissioner considers that in order to determine if disclosure of the information is necessary to meet the legitimate interest of the public he must balance this with the impact of disclosure such as whether it would cause an unwarranted intrusion in to the private lives of the individuals.
35. In reaching this decision the Commissioner is mindful of the fact that the MoJ now publishes broad categories of the reasons why disciplinary action has been taken against members of the judiciary and release of such statistics are intended to increase the public confidence in the judiciary.
36. The Commissioner acknowledges that disclosure might contribute to increasing the public's confidence in the integrity of the judiciary and reassure the public that where necessary appropriate disciplinary action has been taken. However, he has weighed this consideration against the interests of the individual's and considers that release of information would be an unwarranted intrusion into their private lives. Whilst he is mindful of the fact that the individuals actions in their private lives has or may have impacted on their professional lives he considers that the procedures in place for investigating Judicial Complaints as laid out in the Judicial Complaints Protocol provide the public with some reassurance that complaints against members of the judiciary are properly investigated.

37. The Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

The Decision

38. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

i. The application of section 40(2) to the withheld information

39. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

i. Breached the requirements of section 17(1)

Steps Required

40. The Commissioner requires no steps to be taken.

Other matters

41. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

42. Section VI of the Code of Practice (provided for by section 45 of the Act) makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that in the context of provisions in the Act a reasonable time for completing an internal review is 20 working days from the date of the request for review. He accepts that, in exceptional circumstances, it may be reasonable to take longer, but the total time taken should not exceed 40 working days.

43. In this case the complainant requested an internal review on 16 January 2006. MoJ sent its internal review decision to the complainant on 11 November 2006. MoJ have provided no explanation for the delay in completing the review, either to the Commissioner or to the complainant. The Commissioner acknowledges however, that the request that is the subject of this decision notice was made during the relatively early stages of the Act's implementation and prior to the publication of his guidance on the matter. However, he does note that the internal review was only completed after the Commissioner's intervention.

Right of Appeal

44. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 22nd day of September 2008

Signed

**David Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-

- (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”